Supreme Court, U.S.
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IN THE

Supreme Court of the United States

AMERICAN CAST IRON PIPE COMPANY,

Petitioner

v.

JOHN T. BURKS, *et al.*,

Respondents

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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72 pp

QUESTIONS PRESENTED

The Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. §§ 1001 *et seq.* ("ERISA" or "the statute"), is an enormously complex and detailed statute that was designed to regulate employee benefit plans in our nation's economy as exclusively a federal concern. Section 514(a) of the statute, 29 U.S.C. § 1144(a), provides that ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to" any employee benefit plan governed by ERISA. The issues presented by this case are as follows:

1. Do the provisions of ERISA or state law govern claims for health benefits predicated on a 1993 amendment to an ERISA plan reducing those benefits under the plan, when the claims are brought by employees who retired before ERISA's effective date?

2. Did the court of appeals violate the separation-of-powers doctrine or otherwise exceed its authority by creating federal common law in direct conflict with the express provisions of ERISA?

LIST OF PARTIES AND INFORMATION REQUIRED BY RULE 29.6

The petitioner is American Cast Iron Pipe Company. Petitioner has no parent corporation and no publicly held company owns 10% or more of its stock.

The respondents are John T. Burks, Claudia Cook, John Crumb, Ed Dancy, Jr., W.W. Harrell, Hattie B. Jackson, Calvin W. Johnson, Davis Jordan, Myrtle Kilgore, Hardy Douglas Marlin, Sadie L. McLoyd, Grace I. Mealer, William Pollard, and Isaac L. Ross. The respondents, plaintiffs in the district court, brought this action on behalf of themselves and a putative class of others similarly situated, but the district court did not certify a class pursuant to Rule 23 of the Federal Rules of Civil Procedure before it entered final judgment in favor of petitioner and against respondents.

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Petitioner, American Cast Iron Pipe Company, respectfully requests this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered in this action on May 31, 2000. In addition, petitioner respectfully requests this Court to reverse the judgment of the court of appeals and remand this case with directions to enter a judgment affirming the final judgment of the district court entered herein on June 16, 1999.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit at issue is reported in *Burks v. American Cast Iron Pipe Co.*, 212 F.3d 1333 (11th Cir. 2000). The Eleventh Circuit's opinion is reproduced in the Appendix at pages 1a-9a. The final judgment and memorandum opinion of the district court are not reported. They are reproduced in the Appendix at pages 12a-20a.

JURISDICTION

The judgment sought to be reviewed was dated and entered on May 31, 2000. (App. 10a-11a). Petitioner filed a timely petition for rehearing and rehearing *en banc*, which the court of appeals denied by an order dated and entered on July 26, 2000. (App. 21a-22a). This petition for a writ of certiorari is being filed within 90 days after the petition for rehearing and rehearing *en banc* was denied. This Court has jurisdiction to review this case pursuant to 28 U.S.C. § 1254(1).

The United States District Court for the Northern District of Alabama had jurisdiction to entertain the merits of respondents' claims pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1441, the removal statute. The Eleventh Circuit

had jurisdiction to review the district court's final judgment entered in favor of petitioner pursuant to 28 U.S.C. § 1291.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provision involved in this case is Article I, Section 1 of the Constitution of the United States. Article I, Section 1 of the Constitution reads as follows:

> All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

The statutory provisions involved are §§ 402(a)(1), 402(b)(3), 514(a), 514(b)(1), and 514(c)(1) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA" or "the statute"). These provisions are now codified, respectively, in 29 U.S.C. §§ 1102(a)(1), 1102(b)(3), 1144(a), 1144(b)(1), and 1144(c)(1), and read as follows:

> **29 U.S.C. § 1102. Establishment of Plan**
>
> **(a) Named fiduciaries**
>
> (1) Every employee benefit plan shall be established and maintained pursuant to a written instrument . . . .
>
> * * *
>
> **(b) Requisite features of plan**
>
> Every employee benefit plan shall —
>
> * * *

(3) provide a procedure for amending such plan, and for identifying the persons who have authority to amend the plan . . . .

29 U.S.C. § 1144

(a) Supersedure; effective date

Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

(b) Construction and application

(1) This section shall not apply with respect to any cause of action which arose, or any act or omission which occurred, before January 1, 1975.

* * *

(c) Definitions

For purposes of this section:

(1) The term "State law" includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State . . . .

STATEMENT OF THE CASE

A. Proceedings In The District Court.

Respondents, John T. Burks, *et al.*, on behalf of themselves and a putative class of others similarly situated ("respondents" or "plaintiffs"), filed this action in the Circuit Court of Jefferson County, Alabama, on March 15, 1999. (App. 12a-13a). Petitioner, American Cast Iron Pipe Company ("petitioner" or "ACIPCO"), timely filed a Notice of Removal with the United States District Court for the Northern District of Alabama. (App. 13a). Both the district court and the court of appeals in this case correctly held that the district court had subject matter jurisdiction to entertain this action pursuant to 28 U.S.C. § 1331 under the "complete preemption" doctrine, and 28 U.S.C. § 1441, the removal statute, because this action "arises under" ERISA, an Act of Congress regulating commerce. (App. 6a; 9a; 18a).

Plaintiffs "are former employees of defendant, or dependents of former employees of defendant, who retired prior to September 2, 1974." (App. 24a). Plaintiffs claimed they "were promised . . . free prescription drugs, after they retired." (*Id*). According to the complaint, a former President of ACIPCO told a group of ACIPCO's employees at a meeting held in the 1950s that " '[t]he reason we're not getting the same raises as U.S. Steel is getting is because we're putting it into medical so you'll get free drugs when you retire.' " (App. 29a). Plaintiffs admitted in their complaint, however, that ACIPCO "reserved" its right "to amend the health plan" in the 1981, 1987, 1990 and 1995 employee handbooks containing "[s]ummary descriptions of the health benefits available to ACIPCO retirees and dependents" under ACIPCO's ERISA Plan. (App. 29a). The same is true with respect to ACIPCO's 1969 and 1977 employee handbooks containing summary descriptions of the plan. (App. 13a-14a).

Plaintiffs received *free* prescription drugs under ACIPCO's health plan and subsequent ERISA Plans for a minimum of twenty (20) years after they retired. (App. 30a). Until about June 1995, "*all* drugs and medicine . . . were *covered 100%*" under ACIPCO's ERISA Plan. (*Id*). (emphasis added). In "June 1995," the complaint asserts, "retirees and their dependents arbitrarily had a new co-pay imposed upon them to pay 25% of the cost of all drugs." (App. 30a). ACIPCO, however, increased pension benefits by $40.00 per month "to help defray the cost of the co-pay." (App. 3a; 17a).

Based solely on these alleged "promises, statements, representations, and commitments to plaintiffs regarding their benefits," plaintiffs purported to assert a state-law breach of contract claim, state-law fraud claims, a state-law unjust enrichment claim and a state-law conversion claim in their complaint. (App. 31a-34a). For relief, plaintiffs sought a refund of "all co-payments for prescription drugs" paid to ACIPCO and "[i]njunctive relief barring ACIPCO from continuing to require that plaintiffs pay for medical treatment and benefits, including a co-pay for prescription drugs." (App. 35a). Plaintiffs never sought relief under ERISA in the courts below. (App. 3a; 8a). Plaintiffs never sought to amend their complaint in the district court to assert an ERISA claim and did not argue in their briefs filed with the court of appeals that they should be allowed to amend their complaint to assert any claims under ERISA.

ACIPCO filed a motion to dismiss plaintiffs' complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, or, in the alternative, for summary judgment pursuant to Rule 56. (App. 3a). ACIPCO submitted undisputed evidence that each and every health plan established by ACIPCO before Congress enacted ERISA, and each and every ERISA employee welfare benefit plan

established by ACIPCO after Congress enacted ERISA, states on its face, in clear and unambiguous terms, that ACIPCO's provision of health benefits "shall not be construed to create any vested rights in any person" and that ACIPCO "reserves the right to amend, modify, alter, suspend or terminate the Plan in whole or in part at any time." (App. 4a; R1-4-Ex. #1-12). The same is true with respect to each and every employee handbook issued by ACIPCO, with one exception, before Congress enacted ERISA, and each and every summary plan description issued by ACIPCO to its employees and retirees after Congress enacted ERISA. (*Id*).[1]

Instead of submitting any evidentiary material or legal argument in opposition to ACIPCO's motion, plaintiffs filed a motion to continue the court's consideration of ACIPCO's motion for summary judgment, pursuant to Rule 56(f) of the Federal Rules of Civil Procedure. (App. 4a). Plaintiffs did not, however, state how the alleged facts they sought leave to discover, if presented in opposition to ACIPCO's motion, would have created a genuine issue of material fact precluding summary judgment. (R1-7-1-4 & Ex. #A). Along with their motion for a continuance, plaintiffs also filed a motion to remand, arguing that their purported state-law claims were not preempted by ERISA. (App. 4a).

The district court denied plaintiffs' motion to remand, holding that "[t]he case is properly before this court" under the complete-preemption doctrine. (App. 18a).[2] The district court also denied plaintiffs' motion for a continuance to

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1. The 1973 employee handbook, issued prior to ERISA's effective date, does not contain a reservation-of-rights clause. (App. 2a). The court of appeals correctly noted, however, that "the 1973 booklet is not helpful to the plaintiffs because it does not appear to provide for free prescription drugs." (App. 2a n.1).

2. The Eleventh Circuit affirmed the district court's decision denying plaintiffs' motion to remand. (App. 9a).

conduct discovery. (App. 17a). The court held that "[s]ince ERISA is applicable, the court holds that the motion for a continuance of the summary judgment motion for the purpose of conducting more discovery is unnecessary. Discovery will not take this action out of the parameters of ERISA." (App. 17a). Finally, the district court granted ACIPCO's motion for summary judgment. (App. 17a). The court held that plaintiffs' purported state-law claims were completely preempted by ERISA and that ACIPCO "had every right to change the employee benefits and was within its rights in doing so." (App. 18a). The court so held because ACIPCO, both before and after Congress enacted ERISA, reserved the right "to change" medical services and benefits, and because such "benefits were not vested and could change." (App. 18a & n.9). Plaintiffs then appealed. (App. 2a).

B. Proceedings In The Court Of Appeals.

The panel hearing plaintiffs' appeal rendered its decision on May 31, 2000. *Burks v. American Cast Iron Pipe Co.*, 212 F.3d 1333 (11th Cir. 2000). (App. 1a-9a). The Eleventh Circuit correctly held that all of plaintiffs' state-law claims were completely preempted by ERISA and that the district court, having subject matter jurisdiction under the complete-preemption doctrine, properly denied plaintiffs' motion to remand. (App. 6a; 9a).[3] In reaching its holding, the Eleventh Circuit had to determine whether the exception to preemption contained in § 514(b)(1) of ERISA, 29 U.S.C. § 1144(b)(1), saved plaintiffs' claims from the preemptive effect of § 514(a) of the Act, 29 U.S.C. § 1144(a). (App. 5a). Section 514(b)(1) exempts from ERISA preemption "any cause of action which arose, or any act or omission which occurred, before January 1, 1975." 29 U.S.C. § 1144(b)(1).

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3. Indeed, plaintiffs' counsel conceded at oral argument in the court below that the district court had federal question jurisdiction to hear this case under the complete-preemption doctrine.

The Eleventh Circuit held that § 514(b)(1)'s exception to ERISA preemption did not apply because plaintiffs' cause of action arose "at the earliest after 1993, when the Plan was amended to require co-payment." (App. 6a). The court explained that state law is preempted and ERISA provides the exclusive vehicle for relief where, as here, the plaintiff's cause of action accrues after January 1, 1975. (App. 5a-6a). *See generally Paris v. Profit Sharing Plan for Employees of Howard B. Wolf, Inc.*, 637 F.2d 357, 361 (5th Cir.), *cert. denied*, 454 U.S. 836 (1981) (a "cause of action" or "claim" under ERISA "does not accrue until an application for benefits is denied").[4] Accordingly, the court of appeals held that plaintiffs' claims were governed by ERISA and that "ERISA preempts and does not recognize claims based on oral representations that contradict unambiguous written plan terms." (App. 8a).

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4. Although this Court has not directly addressed the issue, every circuit court of appeals that has faced the issue has, like the Eleventh Circuit, interpreted § 514(b)(1)'s "act or omission" exception to preemption narrowly, holding that it applies only when the critical acts or omissions detrimental to the plaintiff that form the basis for suit occurred before January 1, 1975, *not* when *any* relevant act or omission took place. *Quinn v. Country Club Soda Co.*, 639 F.2d 838, 840-41 & n.2 (1st Cir. 1981); *Jiras v. Pension Plan of Make-Up Artist & Hairstylists*, 170 F.3d 162, 165-66 (2d Cir. 1999); *Tanzillo v. Local Union 617*, 769 F.2d 140, 143-44 (3d Cir. 1985); *Rodriquez v. MEBA Pension Trust*, 872 F.2d 69, 72-73 (4th Cir.), *cert. denied*, 493 U.S. 872 (1989); *Paris v. Profit Sharing Plan for Employees of Howard B. Wolf, Inc.*, 637 F.2d 357, 359-61 (5th Cir.), *cert denied*, 454 U.S. 836 (1981); *Woodfork v. Marine Cooks & Stewards Union*, 642 F.2d 966, 970-73 (5th Cir. 1981); *Degan v. Ford Motor Co.*, 869 F.2d 889, 891-95 (5th Cir. 1989); *Reiherzer v. Shannon*, 581 F.2d 1266, 1268-72 (7th Cir. 1978); *Winer v. Edison Bros. Stores Pension Plan*, 593 F.2d 307, 313-14 (8th Cir. 1979); *Gulf Life Ins. Co. v. Arnold*, 809 F.2d 1520, 1525 (11th Cir. 1987). Hence, the "act or omission" exception to ERISA preemption has no application here. (App. 5a-6a).

"But," the Eleventh Circuit continued, "that does not end the analysis." (App. 6a). Having just recognized that ERISA preempted plaintiffs' state-law claims, and that the provisions of ERISA, rather than state law, "provide[ ] the exclusive cause of action for the plaintiffs' claims, which are based on promises that were allegedly broken in the 1990's, well after ERISA's effective date," the Eleventh Circuit nevertheless opined that "plaintiffs' substantive rights to retirement benefits, including retiree health benefits, were created before ERISA existed. ERISA cannot apply retroactively to govern the rights and responsibilities that attached to the Plan before ERISA's effective date." (App. 6a; 9a). According to the court below, "[w]hen participants' rights form before ERISA's effective date, the court as a matter of *federal common law* must interpret the plan 'in light of a worker's pre-ERISA state-law rights.' " (App. 6a-7a) (emphasis added), *quoting Woodfork v. Marine Cooks & Stewards Union*, 642 F.2d 966, 973 (5th Cir. 1981). "As a matter of *federal common law*," the Eleventh Circuit concluded, "the district court should look to *state law* to answer the substantive question of whether the plaintiffs retired (before ERISA's effective date) under a promise to pay lifetime prescription drug benefits that could not be amended or terminated." (App. 9a) (emphasis added).

The Eleventh Circuit affirmed the district court's order denying plaintiffs' motion to remand, reversed the district court's order granting ACIPCO's motion for summary judgment and reversed the court's order denying plaintiffs' motion to continue consideration of ACIPCO's motion for summary judgment. (App. 9a). The court remanded the case to the district court to allow the plaintiffs to "amend their complaint to state ERISA claims and to conduct discovery." (App. 8a). ACIPCO then filed a timely petition for rehearing and rehearing *en banc*, which the court below denied on July 26, 2000. (App. 21a-22a). This petition for a writ of certiorari followed.

REASONS FOR GRANTING THE WRIT

Congress enacted ERISA on September 2, 1974. *See* 88 Stat. 829, as amended, 29 U.S.C. §§ 1001 *et seq.* ERISA is "a 'comprehensive and reticulated statute,' the product of a decade of congressional study of the Nation's private employee benefit system." *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 251 (1993), *quoting Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 361 (1980). ERISA "subjects to *federal* regulation plans providing employees [and retirees] with fringe benefits." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90 (1983) (emphasis added). ERISA contains a "broadly worded preemption provision" that is " 'deliberately expansive' " and designed to establish the regulation of employee benefit plans " 'as *exclusively* a *federal* concern.' " *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 138 (1990) (emphasis added), *quoting Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 46 (1987). *See* 29 U.S.C. § 1144(a). The effect of ERISA preemption is to "eliminate" state-law causes of action and claims based on state law "relating to" employee benefit plans even though state-law causes of action and claims were viable before ERISA's enactment. *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 526 n.23 (1981). Health care plans established by employers before Congress enacted ERISA and that were maintained thereafter became subject to ERISA in 1975. 29 U.S.C. §§ 1002(1), 1003(a), 1144(a).

The court below held that "[a]s a matter of federal common law, the district court should look to *state law* to answer the substantive question of whether the plaintiffs retired (before ERISA's effective date) under a promise to pay lifetime prescription drug benefits that could not be amended or terminated." (App. 9a) (emphasis added). The court so held even though it also held that plaintiffs' state-law claims were completely preempted by ERISA and that ERISA "provides the exclusive cause of action for the

plaintiffs' claims." (App. 9a). In so holding, the Eleventh Circuit rendered a decision on an important question of federal law in direct conflict with applicable decisions of two other federal courts of appeals. The decision below is also inconsistent with a prior decision of this Court. This absence of uniformity is the very outcome Congress sought to avoid when it enacted ERISA. The circuit conflict we discuss below obviously defeats this statutory purpose.

Furthermore, the Eleventh Circuit's decision in this case violates the separation-of-powers doctrine by creating federal common law in direct conflict with three express provisions contained in ERISA itself. The court below simply substituted its judgment for the policy choices made by Congress and included in the statute. But the judicial branch does not have the power to legislate under our Constitution. This case warrants review for the additional reason that it raises important questions regarding the proper distribution of power between the legislative branch and the judicial branch of our national government.

I. The Court Below Decided An Important Question Of Federal Law In Direct Conflict With Decisions Of The Fifth And Sixth Circuits On The Same Issue.

In *Degan v. Ford Motor Co.*, 869 F.2d 889 (5th Cir. 1989), the Fifth Circuit refused to create "federal common law" to allow a claim for benefits based on oral representations made before ERISA's effective date. The plaintiff in *Degan* retired from Ford Motor Company in 1970, *before* Congress enacted ERISA, and made a claim for retirement benefits, at the earliest, in 1979. 869 F.2d at 891. Ford denied plaintiff's claim for benefits on the ground that "his 'break in seniority' [in 1970] made him ineligible for the benefits he requested." *Id.* at 891. Plaintiff later filed suit in state court "alleging breach of an oral agreement to pay special early-retirement benefits and full pension benefits" based on "the oral

assurances made to him in 1970." *Id.* at 890, 893. Ford removed the action to federal court and the district court granted Ford's motion for summary judgment. *Id.* at 891-92. The Fifth Circuit held that plaintiff's state-law claim was preempted by ERISA and removable to federal court under the complete-preemption doctrine. *Id.* at 893. The court also affirmed the district court's judgment on the merits, rejecting plaintiff's argument that ERISA did not apply to the case. *Id.* at 894-95.

The court held that " 'a cause of action does not become a presently enforceable demand until a claim is denied.' " *Id.* at 894, *quoting Paris v. Profit Sharing Plan*, 637 F.2d at 361. In reaching its holding, the court relied in part on its prior decision in *Woodfork v. Marine Cooks & Stewards Union*, *supra*, in which the court rejected the plaintiff's argument that "causes of action are excepted from preemption *whenever* they involve *any* pre-1975 acts or omissions." *Woodfork*, 642 F.2d at 971-72 (emphasis added). The court in *Woodfork* further held that § 514's narrow exception to preemption for "act[s] or omission[s] which occurred before January 1, 1975," 29 U.S.C. § 1144(b)(1), simply "does not preclude ERISA preemption of a claim [for benefits] that arises *after* the January 1, 1975 effective date." *Id.* at 970 (emphasis added).

In rejecting the plaintiff's plea to create "federal common law" to save his claim, the Fifth Circuit stated as follows:

> The problem, however, is one for Congress and not this court to resolve, for we are bound by ERISA's emphatic preference for written agreements. ERISA expressly requires that "[e]very employee benefit plan shall be established and maintained pursuant to a written instrument." 29 U.S.C. § 1102(a)(1). In addition, the written plans must "provide a procedure for

> amending such plan, and for identifying the persons who have authority to amend the plan." *Id.* § 1102(b)(3). Thus, ERISA mandates that the plan itself and any changes made to it were to be in writing. The reasons for Congress's strictures in this area are obvious: Oral agreements would undermine Congress's goal of fashioning a comprehensive system of federal law designed to strengthen and protect the interests of employees in their expected retirement benefits.
>
> * * *
>
> Hence, we join the other circuits that have held, consistently with the words of the statute, that ERISA precludes oral modifications to benefit plans.

869 F.2d at 895.

The Eleventh Circuit's decision in this case that ERISA does not have any effect on plaintiffs' pre-ERISA rights is in direct conflict with the Fifth Circuit's decision in *Degan*, *supra*. The court below committed the precise error avoided by the Fifth Circuit in *Degan* — using state-law principles under the guise of federal common law to change the statutory scheme and result chosen by Congress. The excuse advanced by the Eleventh Circuit in this case for substituting its judgment for the judgment of Congress is that the alleged representations were made before Congress enacted ERISA. That was precisely the excuse advanced by the plaintiff in *Degan*. But the Fifth Circuit in *Degan* correctly recognized that allowing state-law concepts to be imported into ERISA's detailed statutory scheme under the guise of federal common law "would threaten the stability and solvency of many plans upon which so many other employees are dependent." *Degan*, 869 F.2d at 895. The rationale and conclusion adopted by

the court below simply cannot be reconciled with the Fifth Circuit's rationale and conclusion in *Degan*.

Also in direct conflict with the Eleventh Circuit's decision in this case is the Sixth Circuit's *en banc* decision in *Sprague v. General Motors Corp.*, 133 F.3d 388 (6th Cir.) (*en banc*), *cert. denied*, 524 U.S. 923 (1998). In *Sprague*, defendant General Motors Corporation ("GM") "began paying part of the cost of health insurance for its salaried retirees and their surviving spouses" in 1961. 133 F.3d at 393. In 1964, "GM assumed the full cost of basic health insurance for its salaried retirees, and in 1968 it extended this benefit to surviving spouses as well." *Id.* GM later established an employee welfare benefit plan after Congress enacted ERISA. *Id.* Both before and after the enactment of ERISA, GM issued booklets stating that " 'your basic health coverages will be provided at GM's expense for your lifetime.' " *Id.* at 394. The booklets also stated, however, that GM reserved the "right to change or terminate the health care plan at any time." *Id.*

As a result of a number of reductions-in-force, GM amended its retiree health care plan in 1987 to provide for, among other things, a 20% co-payment for medical services. *Id.* at 395. Plaintiffs, on behalf of themselves and a putative class of similarly situated retirees, filed suit in 1989 asserting claims under ERISA and state law. Plaintiffs "challenged the legality of the changes to the health care plan that took effect in 1988." *Id.* Plaintiffs alleged that "GM had bound itself to provide salaried retirees and their spouses basic health coverage for life, entirely at GM's expense," and that the "right to such coverage vested upon retirement, according to the plaintiffs, so the coverage could never be changed or revoked." *Id.* In support of their claims, plaintiffs relied on "numerous oral and written representations about the health care benefits" allegedly made by GM to them *before* they retired. *Id.*

The Sixth Circuit held that plaintiffs' health care benefits were not vested under either ERISA or the terms of the plan documents and that GM had the right to amend the terms of the plan, without plaintiffs' consent, because of the reservation of rights clause contained in the plan itself and the various summary plan descriptions. *Id.* at 399-400, *discussing Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73 (1995). GM did not breach any fiduciary duty owed to plaintiffs when it amended its plan, the Sixth Circuit explained, because "an employer is not a fiduciary when it amends or terminates a plan." *Id.* at 404. The Sixth Circuit in *Sprague* also rejected plaintiffs' arguments based on "statements, promises and representations GM made to them in connection with these programs." 133 F.3d at 402-03. Like the Fifth Circuit, the Sixth Circuit "refused to recognize oral modifications to written plan documents." *Id.* at 402. The court in *Sprague* likewise rejected the plaintiffs' reliance on GM's written statements and representations. The court concluded that the fact "the defendant's statements were made in writing is irrelevant as they do not profess to be plan amendments" and that "documents that do not satisfy ERISA's requirements for plan documents do not qualify as ERISA plan documents." *Id.* at 403. *See* 29 U.S.C. § 1102(b)(1)-(2), (4).[5]

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5. The Sixth Circuit rejected plaintiffs' reliance on booklets published by GM before 1977 because "ERISA's directive that plan administrators furnish summary plan descriptions to participants and beneficiaries . . . did not become generally effective until 1977." *Sprague*, 133 F.3d at 400. The court concluded, therefore, that "only the booklets issued in 1977 and thereafter are relevant to the inquiry." *Id.* The court in *Sprague* also expressly held that "GM's failure to include in some summaries a notice of its right to change the plan does not trump the clearly-stated right to do so in the plan itself." *Id.* at 401. The court explained that "[a]n omission from the summary plan description does not, by negative implication, alter the terms of the plan itself" or create a conflict between the summary plan description and the plan. *Id.*

Unlike the Eleventh Circuit in this case, the Sixth Circuit in *Sprague* did not analyze the merits of the plaintiffs' claims under state-law principles, whether pre-dating ERISA or not. Instead, the Sixth Circuit simply held, consistent with this Court's decision in *Curtiss-Wright Corp. v. Schoonejongen*, *supra*, that ERISA "specifically exempted" welfare plans, including health benefits plans, "from vesting requirements to which pension plans are subject." 133 F.3d at 400, *citing* 29 U.S.C. § 1051(1). Accordingly, "employers 'are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare plans.' " 133 F.3d at 400, *quoting Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. at 78. Plaintiffs' claims in *Sprague* that the written plan was modified by oral and informal written representations also failed under ERISA, based on the strong preference expressed by Congress for reliance on the formal written plan documents. *Sprague*, 133 F.3d at 402-03. *See* 29 U.S.C. § 1102. The " 'scheme that Congress devised' " for informing plan participants and beneficiaries of their rights and obligations was intended to " 'exclusively govern an employer's obligations under ERISA plans.' " *Id.* at 402, *quoting Curtiss-Wright*, 514 U.S. at 84; *Moore v. Metropolitan Life Ins. Co.*, 856 F.2d 488, 492 (2d Cir. 1988).

The Eleventh Circuit in this case, on the other hand, was not content with " 'the scheme that Congress devised.' " *Id.* In fact, the court below went to extraordinary lengths to *avoid* the result that Congress intended. The court conceded that ERISA completely preempted plaintiffs' state-law claims. (App. 5a-6a). The court held that plaintiffs' claims were governed by ERISA and that "ERISA preempts and does not recognize claims based on oral representations." (App. 8a). Yet, the Eleventh Circuit held that "ERISA cannot apply retroactively to govern the rights and responsibilities that attached to the Plan before ERISA's effective date." (App. 6a). Both the Fifth Circuit in *Degan*, *supra*, and the *en banc* Sixth Circuit in *Sprague*, *supra*, reached the opposite

result. Both courts held that ERISA can, and does, apply to govern all rights and responsibilities relating to an employee welfare benefit plan governed by ERISA, even when some of the operative facts occurred before the statute's effective date.

The decision by the Eleventh Circuit in this case is diametrically opposed to the decisions of the Fifth and Sixth Circuits on the same legal issue and leads to irreconcilable results. This absence of uniformity is the very outcome Congress sought to avoid when it enacted ERISA. Congress enacted ERISA for the express purpose of displacing state laws and establishing in their place "*a uniform* and comprehensive regulation" of employee benefit plans in our nation's economy as exclusively a *federal* concern. *Boggs v. Boggs*, 520 U.S. 833, 836 (1997) (emphasis added). The conflict among the circuits on the issue presented here is inimical to the statutory interest in uniformity. The issue presented by this case is also a recurring one on which, as we have shown, the circuit courts are in conflict. *See* 8 *ERISA Litig. Rep.* 26, 31 (Aug. 2000) (discussing one "in a long line of cases involving corporate attempts to terminate retiree welfare benefits . . . [that] will continue to be with us for years"). This Court should grant this petition for a writ of certiorari because the decision below is legally incorrect and in direct conflict with applicable decisions from two other federal courts of appeal on the same legal issue.[6]

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6. The more general holding of the Eleventh Circuit in this case — that in certain circumstances state-law principles should trump the provisions of ERISA — is also contrary to decisions from the Ninth and Tenth Circuits. *See Lafferty v. Solar Turbines Int'l*, 666 F.2d 408 (9th Cir. 1982) (rejecting plaintiffs' argument that the payment of contributions prior to 1975 to a pension plan adopted in 1966 and amended in 1976 to comply with ERISA constituted an "act or omission" occurring before January 1, 1975 requiring the application of state law); *Miller v. Coastal Corp.*, 978 F.2d 622

(Cont'd)

II. The Court Below Decided An Important Question Of Federal Law Inconsistent With This Court's Decision In *Curtiss-Wright Corp. v. Schoonejongen*.

The Eleventh Circuit's decision in this case that principles of state law, rather than the provisions of ERISA, govern plaintiffs' rights is also inconsistent with this Court's decision in *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73 (1995). In *Curtiss-Wright*, the employer established a health benefits program for its retirees in 1966, before Congress enacted ERISA. *See Schoonejongen v. Curtiss-Wright Corp.*, 18 F.3d 1034, 1036 (3d Cir. 1994), *rev'd*, 514 U.S. 73 (1995). In September 1976, the company "established a welfare benefit plan in accordance with the recently enacted ERISA statute." 18 F.3d at 1037. Pursuant to the reservation of rights clause contained in the ERISA plan and various summary plan descriptions, the company amended the plan in 1983 terminating the retirees' health care benefits effective December 1, 1983. *Id.* at 1036.

The retirees brought a class action under ERISA, claiming that the company's termination of their benefits "contradicted oral representations that their health benefits would continue for life." *Id.* at 1038. Plaintiffs claimed these oral promises were made before Congress enacted ERISA. *Id.* at 1038 n.1. This Court held that the plaintiffs' complaint challenging the company's amendment to its ERISA Plan in 1983 "to deprive [the retirees] of health benefits is not a cognizable complaint under ERISA." 514 U.S. at 78. The Court stated as follows:

(Cont'd)
(10th Cir. 1992), *cert. denied*, 507 U.S. 987 (1993) (retiree could not enforce the employer's informal agreements concerning his pension benefits, both oral and written, and made before and after the passage of ERISA, based on federal common law).

> ERISA does not create any substantive entitlement to employer-provided health benefits or any other kind of welfare benefits. Employers or other plan sponsors are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare plans. A company does not act in a fiduciary capacity when deciding to amend or terminate a welfare benefits plan. Nor does ERISA establish any minimum participation, vesting, or funding requirements for welfare plans as it does for pension plans. Accordingly, that Curtiss-Wright amended its plan to deprive respondents of health benefits is not a cognizable complaint under ERISA.

514 U.S. at 78 (internal citations omitted).

It is telling that the Eleventh Circuit's opinion in this case does not even mention this Court's decision in *Curtiss-Wright*. The result that the Eleventh Circuit reached in this case cannot be squared with *Curtiss-Wright*, which held as a matter of statutory interpretation that ERISA does not recognize a cause of action for an employer's decision to amend a welfare benefit plan. Put another way, there is no "vesting" of welfare benefits under ERISA. 514 U.S. at 78. And it made no difference in *Curtiss-Wright* that some of the statements allegedly made to the plaintiffs giving rise to such "vested" benefits were made before Congress enacted ERISA. *See also Alday v. Container Corp. of America*, 906 F.2d 660, 664 (11th Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991) ("It is unnecessary for us to decide whether Alday would have been entitled to recover under pre-ERISA law. . . . ERISA purposefully displaced the common law"). Because the decision below is legally incorrect and inconsistent with a prior decision of this Court, the Court should issue the writ.

III. The Court Below Violated The Separation-Of-Powers Doctrine By Creating Federal Common Law In Direct Conflict With Three Express Provisions Contained In ERISA.

The authority of the federal courts "to develop a federal common law under ERISA is not the authority to revise the text of the statute." *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 259 (1993) (internal quotations & citation omitted). After all, Congress, not the courts, has the power under the Constitution to legislate — the authority to exercise its will in enacting national policy choices. *See* U.S. Const. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States. . . ."). The "responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones." *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 866 (1984). The "separation of powers is too fundamental for [the courts] to preempt congressional action by judicially decreeing what accords with 'common sense and the public weal.' " *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 195 (1978). The doctrine requires the courts to respect the policy choices made by Congress. *Id.* at 194-95.

These concerns have particular relevance to ERISA. As discussed earlier, ERISA is "a 'comprehensive and reticulated statute,' the product of a decade of congressional study of the Nation's private employee benefit system." *Mertens v. Hewitt Assocs.*, 508 U.S. at 251, *quoting Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. at 361. It involved numerous hearings and committee sessions and *hundreds* of compromises. *See* 120 Cong. Rec. S29961 (statement of Sen. Schweiker) (daily ed. Aug. 22, 1974). Although comprehensive and detailed, the rights and remedies contained in ERISA do not include every right and remedy that Congress could have created; nor does ERISA

include all rights and remedies that formally existed under ERISA-preempted state law. *See, e.g., Reich v. Rowe*, 20 F.3d 25, 31-32 (1st Cir. 1994); *McRae v. Seafarers' Welfare Plan*, 920 F.2d 819, 823 (11th Cir. 1991). Instead, ERISA "resolved innumerable disputes between powerfully competing interests — not all in favor of potential plaintiffs." *Mertens*, 508 U.S. at 262. *See, e.g., Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54-56 (1987). The courts may not, therefore, "attempt to adjust the balance between those competing goals that the text adopted by Congress has struck." *Mertens*, 508 U.S. at 263. *See also Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 147 (1985) ("We are reluctant to tamper with an enforcement scheme crafted with such evident care as the one in ERISA"). Under our separation-of-powers regime, the federal courts must not substitute their will for the will of Congress by adding rights, obligations or remedies to those chosen by Congress and expressed in ERISA itself. Yet that is precisely what the court below did in this case.

ERISA is a statutory scheme "built around reliance on the face of written plan documents." *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. at 83. One of ERISA's "core fundamental requirements" is that " 'every employee benefit plan shall be established and maintained pursuant to a written instrument.' " *Id.* (emphasis in original), *quoting* 29 U.S.C. § 1102(a)(1). The writing requirement "lends predictability and certainty to employee benefit plans" and "serves the interests of both employers and employees." *Sprague*, 133 F.3d at 402. Indeed, "employees would be unable to rely on those plans if their expected retirement benefits could be radically affected by funds disbursed to other employees pursuant to oral agreements." *Miller v. Coastal Corp.*, 978 F.2d 622, 625 (10th Cir. 1992), *cert. denied*, 507 U.S. 987 (1993). For the same reason, "Congress expressly prohibited informal *written* amendments to ERISA plans under 29 U.S.C. 1102(b)(3)." *Alday*, 906 F.2d at 665 (emphasis in original); *see also Miller v. Coastal Corp.*,

supra. The decision below contravenes these express provisions contained in the statute as well as congressional policy. *See, e.g., Olson v. General Dynamics Corp.*, 960 F.2d 1418, 1423 (9th Cir. 1991) ("we agree with the district court that to devise a federal common law remedy for Olson's claim would defeat the scheme created by Congress in ERISA"), *cert. denied*, 504 U.S. 986 (1992).

In addition to being in direct conflict with §§ 1102(a)(1) and 1102(b)(3) of the statute, the decision below is also in direct conflict with § 1144(a), ERISA's "broadly worded preemption provision" that is " 'deliberately expansive' " and designed to establish the regulation of employee benefit plans " 'as *exclusively* a *federal* concern.' " *Ingersoll-Rand Co. v. McClendon*, 498 U.S. at 138 (emphasis added), *quoting Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. at 46. To ensure that its efforts to standardize the regulation of benefits was not undermined by various state laws, Congress deliberately preempted all state laws and state-law causes of action save those falling within the narrow exception contained in § 514(b)(1). 29 U.S.C. § 1144(b)(1). Section 514(b)(1) represents Congress's deliberation of, and resolution of, the precise issue that apparently troubled the Eleventh Circuit in this case: how to balance expectations based upon the prior law against the need for uniform federal regulation of the area. Section 514(b)(1) was how Congress struck the balance. As the Eleventh Circuit conceded in its decision in this case, § 514(b)(1) does not save plaintiffs' claims from preemption. (App. 5a-6a).

The Eleventh Circuit's decision in this case, however, evidences distaste for the policy decisions made by Congress in enacting ERISA. It attempted to circumvent congressional will by importing pre-ERISA state-law principles that are not only inconsistent with the policies underlying the statute, but in this context are contrary to the express language of the statute itself. The court was not satisfied with the balance

struck by Congress and chose another: ERISA, according to the decision in this case, must bow to state-law principles under the guise of federal common law whenever *any* alleged "right" under a benefit plan "arose" before ERISA's effective date. Not a word in the statute supports this result and this Court has "emphasized its unwillingness to infer causes of action in the ERISA context." *Mertens v. Hewitt Assocs.*, 508 U.S. at 254. In fact, "[t]he establishment of a self-consciously comprehensive program by Congress strongly suggests that there is *no room* for courts to attempt to improve on that program with federal common law." *City of Milwaukee v. Illinois & Michigan*, 451 U.S. 304, 319 (1981) (emphasis added). The objective under ERISA "is not to fulfill policy objectives of state law but to fulfill the congressional command embodied in the language and structure of the federal statute." *Thomason v. Aetna Life Ins. Co.*, 9 F.3d 645, 647 (7th Cir. 1993). For all of these reasons, the court below violated the separation-of-powers doctrine by substituting its own will for the will of Congress. *Tennessee Valley Authority v. Hill*, 437 U.S. at 194-95. This Court should, therefore, issue the writ.

CONCLUSION

For the foregoing reasons, the Court should issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, reverse the judgment of the court of appeals, and remand the case with directions to enter a judgment affirming the judgment of the district court.

Respectfully submitted,

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APPENDIX

OPINION AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED AND FILED MAY 31, 2000

John T. BURKS, Claudia Cook, et al.,

Plaintiffs-Appellants,

v.

AMERICAN CAST IRON PIPE COMPANY,

Defendant-Appellee.

No. 99-12191.

United States Court of Appeals,
Eleventh Circuit.

May 31, 2000.

Employees who retired before effective date of Employee Retirement Income Security Act (ERISA) brought state court action against employer for breach of contract. After employer removed case to federal court, the United States District Court for the Northern District of Alabama, No. 99-01085-CV-G-S, J. Foy Guin, Jr., J., granted employer's motion for summary judgment, and retirees appealed. The Court of Appeals held that: (1) ERISA provided exclusive cause of action for claims; (2) interpretation of plan was governed by state law, not ERISA; and (3) district court abused its discretion in not permitting discovery.

Affirmed in part, reversed in part and remanded.

Appeal from the United States District Court for the Northern District of Alabama.

Before BIRCH and BARKETT, Circuit Judges, and ALARCON*, Senior Circuit Judge.

PER CURIAM:

Plaintiffs-appellants are a group of retirees and their dependents who claim that American Cast Iron Pipe Company ("Cast Iron") promised them health benefits, including free prescription drugs for life. They base their claims on oral representations, including a promise by Cast Iron's former president, Steve Moxley, in the 1950's that "[t]he reason we're not getting the same raises as U.S. Steel is getting is because we're putting it into medical so you'll get free drugs when you retire."

In addition to these oral representations, the plaintiffs allegedly relied on a written plan description from 1973 promising lifetime health benefits without reserving the right to amend the plan. The plaintiffs included a copy of a 1973 plan booklet in the record excerpts provided on appeal; however, the 1973 document does not appear to be in the actual district court record and will not be considered.[1]

Relying on these alleged representations and plan documents, the former employees worked for Cast Iron until their retirement. They all retired before September 2, 1974, the day the Employee Retirement Income Security Act

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* Honorable Arthur L. Alarcon, Senior U.S. Circuit Judge for the Ninth Circuit, sitting by designation.

1. At any rate, the 1973 booklet is not helpful to the plaintiffs because it does not appear to provide for free prescription drugs.

(ERISA) was enacted. For over twenty years, the retirees received free medical care and medications through Cast Iron's health clinic and in-house pharmacists.

In 1993, a change in financial accounting standards (FAS No. 106) increased the negative effect of the benefit plan upon Cast Iron's financial statements.[2] Cast Iron reacted by amending its benefit plan to require that the plaintiffs pay 25% of the cost of their drugs and medicines. To soften the harm to the retirees, Cast Iron increased pensions by forty dollars a month.

Unhappy with this change, the plaintiffs sued in Alabama state court and alleged breach of contract, fraud, unjust enrichment, and conversion. Their complaint was based not only on the required co-pay but also on claims of price-gouging by Cast Iron's pharmacists, who allegedly charged almost 900% of the Wal-Mart price for the same medication. Although Cast Iron formed a committee in response to the retirees' complaints about pricing, the plaintiffs claimed Cast Iron's actions were inadequate. They sought injunctive relief to ensure that Cast Iron's pharmacists would charge competitive prices.

Cast Iron removed the case to federal district court based on ERISA preemption. That same day it filed a motion to dismiss or in the alternative for summary judgment, supported by an affidavit of its Director of Human Resources, Leann Barr. Ms. Barr's affidavit attached thirteen excerpts

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2. For discussions of the negative effect of FAS No. 106 on retiree health benefits, see, *e.g.*, *Wise v. El Paso Natural Gas Co.*, 986 F.2d 929, 932-33 and n. 3 (5th Cir.1993); Gregory J. Ossi, Comment, *It Doesn't Add Up*, 13 J. Contemp. Health L. & Pol'y 233, 240 (1996) (noting that "[b]y the end of 1994, almost half of the companies in the United States had modified retiree health benefits because of FAS 106").

from various versions of the health benefit plan (the "Plan") and other plan documents dating from 1966 through 1993. These excerpts noted that benefits were not vested and reserved the right to change or terminate benefits. Full plan documents were not provided.

Shortly after receiving Cast Iron's motion, the district court entered a scheduling order giving the plaintiffs fourteen calendar days to submit briefs, affidavits and any other materials opposing summary judgment. The plaintiffs moved to continue consideration of the summary judgment motion until they had a chance to conduct discovery. Supporting their motion was an affidavit from their counsel stating that discovery was necessary to review the entire plan documents, of which the plaintiffs had received only excerpts, and to investigate the extent and nature of oral representations regarding benefits. The plaintiffs also moved to remand the case to state court on the grounds that ERISA did not preempt their claims.

The district court simultaneously denied the plaintiffs' motions and granted summary judgment against them. The court ruled that ERISA preempted the plaintiffs' claims because "[h]ealth care plans established by employers before Congress enacted ERISA and that were maintained thereafter became subject to ERISA in 1975." The court implicitly ruled that ERISA's enactment wiped out responsibilities based on actions or misrepresentations predating ERISA. It further ruled that pre-ERISA employee handbooks and plan documents did not create vested rights to health benefits.

The plaintiffs appealed. Because the district court improperly applied post-ERISA substantive law to rights created before the enactment of ERISA, we affirm in part and reverse in part.

DISCUSSION

We review the grant of summary judgment *de novo* and use the same legal standards as the district court. *See Clark v. Coats & Clark, Inc.*, 990 F.2d 1217, 1222 (11th Cir.1993). The judge's decision not to grant a continuance under Rule 56(f), Federal Rules of Civil Procedure, is reviewed for abuse of discretion. *See Carmical v. Bell Helicopter Textron, Inc.*, 117 F.3d 490, 493 (11th Cir.1997). We review the denial of a remand motion *de novo*. *See Butero v. Royal Maccabees Life Ins. Co.*, 174 F.3d 1207, 1211 (11th Cir.1999).

Central to all the issues on appeal is the extent to which ERISA preempts the claims of plaintiffs who all retired before ERISA's effective date. When Congress enacted ERISA in 1974, it greatly changed the responsibilities for sponsors and administrators of employee benefit plans. Aware of the potential unfairness of imposing ERISA's requirements retroactively, Congress provided that ERISA "shall not apply with respect to any cause of action which arose, or any act or omission which occurred, before January 1, 1975." 29 U.S.C. § 1144(b)(1). This provision contains inherent tensions where substantive rights were created before ERISA's effective date but the cause of action arose after it. *See, e.g., Rochford v. Joyce,* 755 F.Supp. 1423, 1426-27 (N.D.Ill.1990) (discussing different circuits' approaches to § 1144(b)(1) and citing cases). In *Woodfork v. Marine Cooks & Stewards Union,* 642 F.2d 966 (5th Cir.1981), the predecessor to this court resolved the tensions by ruling that whenever a cause of action for employee benefits accrues after January 1, 1975, ERISA preempts the mechanism for seeking relief. *See id.* at 970. This reading of the statute promotes Congress's goal of providing a federal forum for employee benefit plan participants. *See id.* at 972.

The plaintiffs' claims accrued at the earliest after 1993, when the Plan was amended to require co-payment. *See Vaughter v. Eastern Air Lines, Inc.*, 817 F.2d 685, 692 (11th Cir.1987) (employee benefit claims accrued when participants "became aware of the facts necessary to make their claims"). Alternatively, their causes of action accrued even later, when they applied for 100% coverage of their medications and were denied. *See Paris v. Profit Sharing Plan for Employees of Howard B. Wolf, Inc.*, 637 F.2d 357, 361 (5th Cir.1981) (ERISA "cause of action does not accrue until an application [for benefits] is denied"). Therefore, the plaintiffs must bring their claims under the section of ERISA that creates a cause of action to recover benefits, enforce plan rights, or clarify entitlement to future benefits. *See* 29 U.S.C. § 1132(a)(1)(B).[3] Since ERISA "super-preempts" section 1132(a)(1)(B) claims even if they are brought in the guise of state law claims, the judge properly denied the plaintiffs' motion for remand. *See, e.g., Metropolitan Life Ins. v. Taylor,* 481 U.S. 58, 63-64, 107 S.Ct. 1542, 95 L.Ed.2d 55 (1987) ("any civil complaint raising this select group of claims is necessarily federal in character"). But that does not end the analysis.

The plaintiffs' substantive rights to retirement benefits, including retiree health benefits, were created before ERISA existed. ERISA cannot apply retroactively to govern the rights and responsibilities that attached to the Plan before ERISA's effective date. Cast Iron recognizes this, for it argues in its brief that ERISA's summary plan description requirements did not apply retroactively to the 1973 plan booklet. When participants' rights form before ERISA's

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3. Although the record is not fully developed, if Cast Iron's in-house pharmacists did indeed unreasonably overcharge for prescription drugs, potential additional causes of action might exist under 29 U.S.C. § 1132(a)(2) or (a)(3).

effective date, the court as a matter of federal common law must interpret the plan "in light of a worker's pre-ERISA state law rights." *Woodfork*, 642 F.2d at 973; *see also Sprague v. General Motors Corp.*, 133 F.3d 388 (6th Cir.1998) (en banc). In discussing liability for retiree health benefits based on summaries that pre-dated ERISA's summary plan description requirements, the *Sprague* court stated: "If the plaintiffs have any cause of action based on [pre-ERISA] summaries, it is probably not one based on ERISA." *Id.* at 400; *see also Jameson v. Bethlehem Steel Corp. Pension Plan*, 765 F.2d 49, 51-52 (3d Cir.1985) ("ERISA's substantive provisions are not to be used to determine the law at the time of incidents occurring before January 1, 1975."). In the present case, the district court erred by applying ERISA substantive law retroactively to pre-1975 responsibilities. Accordingly, we remand for the district court to consider whether, under the law applicable to welfare benefit plans when the plaintiffs retired, Cast Iron promised to cover 100% of the plaintiffs' drug expenses and whether that promise was unalterable and irrevocable.

Extrinsic evidence may be necessary to illuminate plan documents if they are ambiguous under state law. *Cf. Stewart v. KHD Deutz of Am. Corp.*, 980 F.2d 698, 702-703 (11th Cir.1993) (interpreting collective bargaining agreement under the Labor Management Relations Act and Georgia law: when the agreement promised benefits "during retirement" but also retained the right to " 'amend, modify, suspend or discontinue' " employee benefit plans, it was ambiguous). Since discovery will be necessary to address these issues, the district court abused its discretion in failing to grant a continuance under Rule 56(f).

Because the court may determine that the Plan could be amended with respect to the plaintiffs after ERISA's effective date and that post-ERISA amendments apply to them, we

address the effect of ERISA substantive preemption on the scope of discovery and the propriety of summary judgment. The district court denied the plaintiffs' Rule 56(f) motion for continuance because "[d]iscovery will not take this action out of the parameters of ERISA." The court apparently believed that no amount of discovery could enable the plaintiffs to oppose summary judgment once ERISA preempted their claims. But even if ERISA does establish the parameters that govern this action, the plaintiffs are not necessarily dead in the water.

The plaintiffs allege that written plan documents entitle them to lifetime benefits and that they have been deprived of those benefits. In addition, they allege price-gouging by in-house pharmacists. As we have explained, these facts support claims under 29 U.S.C.§ 1132(a)(1)(B) and possibly §§ 1132(a)(2) and (a)(3). The plaintiffs should be allowed to amend their complaint to state ERISA claims[4] and to conduct discovery, at least sufficient for them to review the applicable plan documents in their entirety, to enable them to oppose Cast Iron's motion for summary judgment.

ERISA preempts and does not recognize claims based on oral representations that contradict unambiguous written plan terms. *See, e.g., Alday v. Container Corp. of Am.*, 906 F.2d 660, 665-66 (11th Cir.1990). Accordingly, the need to scrutinize plan documents in their entirety is crucial, particularly when those documents are in the exclusive control of the defendant. The plaintiffs' counsel properly noted this need in his Rule 56(f) affidavit. In addition, discovery

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4. *See Woodfork v. Marine Cooks & Stewards Union*, 642 F.2d 966, 976 (5th Cir.1981) (judge abused discretion in failing to grant motion for leave to amend complaint to state ERISA claims; court can *sua sponte* allow plaintiff to amend state-law complaint to state a claim under ERISA).

regarding price-gouging and misrepresentation may be necessary to oppose summary judgment on fiduciary claims.

CONCLUSION

ERISA provides the exclusive cause of action for the plaintiffs' claims, which are based on promises that were allegedly broken in the 1990's, well after ERISA's effective date. As a matter of federal common law, however, the district court should look to state law to answer the substantive question of whether the plaintiffs retired (before ERISA's effective date) under a promise to pay lifetime prescription drug benefits that could not be amended or terminated. The district court should allow discovery before considering summary judgment against the plaintiffs. Accordingly, the denial of the motion for remand is AFFIRMED. The grant of summary judgment against the plaintiffs is REVERSED. The denial of the plaintiffs' motion for continuance of consideration of summary judgment is REVERSED.

FILED
MAY 31, 2000

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 99-12191

District Court No. 99-01085-CV

JOHN T. BURKS, CLAUDIA COOK, et al.,

Plaintiffs-Appellants,

versus

AMERICAN CAST IRON PIPE COMPANY,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Alabama

Before BIRCH and BARKETT, Circuit Judges, and ALARCON*, Senior Circuit Judge.

JUDGMENT

This cause came to be heard on the transcript of the record from the United States District Court for the Northern District of Alabama, and was argued by counsel;

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the

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* Honorable Arthur L. Alarcon, Senior U.S. Circuit Judge for the Ninth Circuit, sitting by designation.

said District Court in this cause be and the same is hereby AFFIRMED and REVERSED in part;

IT IS FURTHER ORDERED THAT defendant-appellee pay to plaintiffs-appellants, the costs on appeal to be taxed in accordance with Fed.R.App.P. 39.

Entered: May 31, 2000
For the Court: Thomas K. Kahn,
Clerk

By: /s/ Matt Davidson
Deputy Clerk

ISSUED AS MANDATE: AUG 07 2000

MEMORANDUM OPINION AND FINAL ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION, GRANTING SUMMARY JUDGMENT DATED, ENTERED AND FILED JUNE 16, 1999

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CIVIL ACTION NO. 99-G-1085-S

JOHN T. BURKS; CLAUDIA COOK; JOHN CRUMB; ED DANCY, JR.; CALVIN W. JOHNSON; DAVIS JORDAN; MYRTLE KILGORE; HARDY DOUGLAS MARLIN; SADIE L. MCLOYD; GRACE I. MEALER; WILLIAM POLLARD; ISAAC L. ROSS; for themselves and as representatives of the class comprised of all those who retired from AMERICAN CAST IRON PIPE COMPANY prior to September 2, 1974, and their dependents,

Plaintiffs,

v.

AMERICAN CAST IRON PIPE COMPANY,

Defendant.

Entered June 16, 1999

MEMORANDUM OPINION

John T. Burks and the other-named plaintiffs in the above-styled case filed suit in the Circuit Court of Jefferson County, Alabama, on March 15, 1999, on behalf of

themselves and a putative class. The defendant was not served until an April 1, 1999, amended summons and amended complaint were served by certified mail on April 5, 1999. Defendant removed the case to federal court on April 30, 1999. Plaintiffs filed a motion to remand, and defendant filed a motion to dismiss, or in the alternative for summary judgment which this court has taken as a motion for summary judgment. Plaintiffs filed a motion to continue the summary judgment motion to allow for discovery.

Plaintiffs, former employees of American Cast Iron Pipe Company [hereinafter ACIPCO] or dependents of former ACIPCO employees who retired prior to September 2, 1974, allege ACIPCO[1] promised them free lifetime medical treatment and benefits, including free prescription drugs following retirement.

Summaries of ACIPCO health plans were distributed to employees through the years incorporated within employee manuals or employee handbooks. Language in paragraph one of the September 1969 manual follows:

> Acipco provides medical services and sick benefits to employees, retired employees and certain dependents as outlined in subsequent paragraphs. Medical services and sick benefits provided may be changed or abolished without notice at Management's discretion. This statement is descriptive only and shall not be construed to create any vested rights in any person or obligation on the part of the Company.

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1. The complaint specifies that Steve Moxley, a former ACIPCO president, told them in the 1950's that the promised benefits replaced higher wages received by employees of U.S. Steel. In addition plaintiffs allege that the promises were regularly made by senior ACIPCO executives before and after 1974.

Identical or substantially identical language appeared in later manuals: the March 2, 1972, manual; November 1977 manual; November 1981 manual; June 1, 1987, manual (welfare plan[2] under ERISA); and, June 7, 1990, manual.

On September 2, 1974, Congress enacted the Employee Retirement Income Security Act of 1974 [hereinafter ERISA], 29 U.S.C. §§ 1001 *et seq.* Enactment of ERISA was to protect "the interests of participants in employee benefit plans and their beneficiaries," 29 U.S.C. § 1001(b), and to safeguard the financial integrity of employee benefit plans through "uniform and comprehensive regulation" of the plans. *Boggs v. Boggs*, 520 U.S. 833, 117 S.Ct. 1754, 1758, 138 L. Ed. 2d 45 (1997), *reh'g denied*, 118 S.Ct. 9, 138 L. Ed. 2d 1043 (1997).

ERISA carries with it a preemption clause set forth below:

> Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

29 U.S.C. § 1144(a). *See also, Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90, 103 S. Ct. 2890, 77 L. Ed. 2d 490 (1983) (ERISA "subjects to federal regulation plans providing employees [and retirees] with fringe benefits."); *Ingersoll-*

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2. The plan established by ACIPCO was the "American Cast Iron Pipe Company Medical and Dental Benefits Plan for Employees and Pensioners Other Than Active Branch Office Employees" [hereinafter the Plan].

Rand Co. v. McClendon, 498 U.S. 133, 138 (1990), 111 S. Ct. 478,112 L. Ed. 2d 474, 483 (1990) (ERISA contains a "broadly worded preemption provision" that is "deliberately expansive" and designed to establish the regulation of employee benefit plans "as exclusively a federal concern.") (Quoting language from *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 46, 107 S. Ct. 1549, 95 L. Ed. 2d 39 (1987)); *Amos v. Blue Cross-Blue Shield of Ala.*, 868 F.2d 430, 431 (11th Cir. 1989), *cert. denied*, 493 U.S. 855 (1989) ("ERISA preemption is not a gateway but a barrier to state law causes of action, the effect of which is to completely displace state law claims."); *Howard v. Parisian, Inc.*, 807 F. 2d 1560, 1563 (11th Cir. 1987) (The assertion of claims arising under state law is preempted by ERISA "even if those laws do not expressly concern employee benefit plans and amount only to indirect regulation of such plans.")

Exclusive enforcement provisions of ERISA are set forth in 29 U.S.C. § 1132(a). Civil suit may be brought by a participant or beneficiary, Secretary, fiduciary, or employer, with specific provisions set forth for pursuit of remedies by the named parties.

ERISA provides that Section 514(a) "shall not apply with respect to any cause of action which arose, or any act or omission which occurred, before January 1, 1975." 29 U.S.C. § 1144(b). Health care plans established by employers before Congress enacted ERISA and that were maintained thereafter became subject to ERISA in 1975. 29 U.S.C. §§ 1002(1),[3] 1003(a), 1144(a). *See also Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 526 n.23, 101 S. Ct. 1895, 68 L. Ed. 2d 402, 418 n.23 (1981) (Congress's enactment of ERISA

3. "The terms 'employee welfare benefit plan' and 'welfare plan' mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, ..."

eliminated state law causes of action and state law claims relating to employment benefit plans which were viable before ERISA's enactment.)

Since ERISA became law ACIPCO's health plan has been operated and administered in compliance with the law. Its Plan fulfills the five prerequisites for an ERISA welfare benefit plan: (1) an employee benefit plan (2) established and maintained (3) by ACIPCO (employer) (4) for the purpose of providing medical benefits (5) to participants and their families. *Smith v. Jefferson Pilot Life Insurance Company*, 14 F.3d 572, 567 (11th Cir. 1994), *cert. denied*, 513 U.S. 808 (1994). The plan is maintained pursuant to a written instrument,[4] provides a procedure for amending the plan,[5]; and provides a claims procedure as required by § 503 of ERISA.[6]

Beginning January 1, 1993, the Financial Accounting Standards Board changed its accounting procedures requiring reporting on financial statements of future contingent liabilities relating to retiree benefits.[7] In response to FASB 106 which increased ACIPCO's liability for accounting purposes on its financial statement, ACIPCO's Board of Directors[8] amended its Plan. Amendments included provisions by which "pensioners and dependents previously covered at 100% of the eligible charges for prescription drugs

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4. 29 U.S.C. § 1102(a)(1); (2).

5. 29 U.S.C. § 1102(b)(3).

6. 29 U.S.C. § 1133.

7. The new standard was known as Financial Accounting Standards Board No. 106, [hereinafter FASB 106].

8. The board includes non-management employee directors.

dispensed at the ACIPCO Pharmacy" would have to make a 25% co-pay. A $40 a month increase in pensions was granted to help defray the cost of the co-pay.

Plaintiffs have objected to the change and have claimed ACIPCO misrepresented that they were entitled to continued free medical benefits and treatments, including prescription drugs, after they retired, relying on the alleged statements of Moxley and other senior ACIPCO executives. These "misrepresentations," however, took place years before the enactment of ERISA. For twenty years ACIPCO has provided complete medical benefits to its employees and retirees, and their dependents. It was not until 1994 after FASB 106 was in place that ACIPCO amended its Plan requiring participants to contribute to the cost of medicine. In spite of any alleged "oral promises," the language in employee plans or handbooks, either distributed to or made available to ACIPCO employees prior to enactment of ERISA, specifically states that the benefits were subject to change and that participants did not have vested rights.

The court has several motions before it. The primary motion is the motion for summary judgment. Material submitted to the court on this motion is dispositive in reaching decisions on the other motions. For the reasons set forth above the court holds that as a matter of law the motion for summary judgment should be granted. ERISA preempts any state claims alleged by plaintiffs. ERISA is applicable to the case at bar.

Since ERISA is applicable the court holds that the motion for a continuance of the summary judgment motion for the purpose of conducting more discovery is unnecessary. Discovery will not take this action out of the parameters of ERISA.

The court further holds that the motion to remand should be denied. ERISA preempts state law claims. The case is properly before this court.

As an aside, the court notes that ACIPCO has treated its retirees and their dependents well through the years, caring for their medical needs. Although the company was not obligated to provide complete, free medical care,[9] it continued to provide these benefits until the enactment of FASB 106 changed its liability. The company had every right to change the employee benefits and was within its rights in doing so.

An order consistent with this opinion is being entered contemporaneously herewith.

DONE and ORDERED this 16th day of June 1999.

/s/ J. Foy Guin, Jr.
UNITED STATES DISTRICT JUDGE
J. FOY GUIN, JR.

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9. ACIPCO specifically stated with the publication of each employee manual that benefits were not vested and could change.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CIVIL ACTION NO. 99-G-1085-S

JOHN T. BURKS; CLAUDIA COOK; JOHN CRUMB; ED DANCY, JR.; CALVIN W. JOHNSON; DAVIS JORDAN; MYRTLE KILGORE; HARDY DOUGLAS MARLIN; SADIE L. MCLOYD; GRACE I. MEALER; WILLIAM POLLARD; ISAAC L. ROSS; for themselves and as representatives of the class comprised of all those who retired from AMERICAN CAST IRON PIPE COMPANY prior to September 2, 1974, and their dependents,

Plaintiffs,

v.

AMERICAN CAST IRON PIPE COMPANY,

Defendant.

Entered June 16, 1999

FINAL ORDER GRANTING SUMMARY JUDGMENT

This cause comes before the court on the motion of defendant American Cast Iron Pipe Company to dismiss, or in the alternative for summary judgment (which this court has taken as a motion for summary judgment), motion of plaintiffs to remand, and motion of plaintiffs to continue the motion for summary judgment in order for them to conduct discovery. Having considered the motions, the pleadings, the submissions of counsel, and the applicable law, the court is of the opinion that judgment is due the defendant as a matter

of law, there being no genuine issue of material fact, and there being no just reason for delay in entering a final judgment. Accordingly, in conformity with the memorandum opinion being entered contemporaneously herewith, it is,

ORDERED, ADJUDGED and DECREED that the motion for continuance of the summary judgment motion for the purpose of conducting discovery be and it hereby is DENIED. It is

FURTHER ORDERED, ADJUDGED and DECREED that the motion of plaintiffs to remand this cause be and it hereby is DENIED, state claims having been preempted by the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. § 1001 *et seq.* It is

FURTHER ORDERED, ADJUDGED and DECREED that the motion of the defendant for summary judgment be and it hereby is GRANTED as a matter of law, there being no genuine issue of material fact. It is

FURTHER ORDERED that any outstanding motions be and they hereby are declared MOOT by the entry of this order. It is

FURTHER ORDERED, ADJUDGED and DECREED that FINAL JUDGMENT be and it hereby is ENTERED in favor of the defendant, and the plaintiffs shall have and recover nothing of the defendant in this action.

DONE and ORDERED this 16th day of June 1999.

/s/ J. Foy Guin, Jr.
UNITED STATES DISTRICT JUDGE
J. FOY GUIN, JR.

PER CURIAM ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED JULY 26, 2000

FILED
JULY 26, 2000

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 99-12191-HH

JOHN T. BURKS, CLAUDIA COOK, et al.,

Plaintiffs-Appellants,

versus

AMERICAN CAST IRON PIPE COMPANY,

Defendant-Appellee.

On Appeal from the United States District Court for the Northern District of Alabama

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC
(Opinion _____, 11th Cir., 19__, __ F.2d __).

Before: BIRCH and BARKETT, Circuit Judges, and ALARCON*, Circuit Judge.

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* Honorable Arthur L. Alarcon, U.S. Circuit Judge for the Ninth Circuit, sitting by designation.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ [illegible]
UNITED STATES CIRCUIT JUDGE

AMENDED CLASS ACTION COMPLAINT

FILED
APRIL 1, 1999

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA

Civil Action No. CV-99-1475

**AMENDED CLASS ACTION COMPLAINT
JURY DEMAND**

JOHN T. BURKS; CLAUDIA COOK; JOHN CRUMB; ED DANCY, JR.; W. W. HARRELL; HATTIE B. JACKSON; CALVIN W. JOHNSON; DAVIS JORDAN; MYRTLE KILGORE; HARDY DOUGLAS MARLIN; SADIE L. MCLOYD; GRACE I. MEALER, WILLIAM POLLARD; ISAAC L. ROSS; for themselves and as representatives of the class comprised of all those who retired from AMERICAN CAST IRON PIPE COMPANY prior to September 2, 1974, and their dependents,

Plaintiffs,

VS.

AMERICAN CAST IRON PIPE COMPANY,

Defendant.

AMENDED COMPLAINT FOR MONETARY AND INJUNCTIVE RELIEF AND DEMAND FOR JURY TRIAL

COME NOW plaintiffs and provide this Amended Complaint for Monetary Injunctive Relief and Demand for

Jury Trial against defendant, American Cast Iron Pipe Company, Inc., as follows:

Preliminary Statement

1. This is a class action for compensatory and punitive damages, as well as for injunctive relief, to redress the injuries caused by defendant's failure to fulfill its promise to provide free medical treatment and benefits to its retirees and their dependents, and to prevent defendant from engaging in such conduct in the future. Plaintiffs are former employees of defendant, or dependents of former employees of defendant, who retired **prior to September 2, 1974**,[1] who were promised free medical treatment and benefits, to include free prescription drugs, after they retired. Recently, however, plaintiffs and/or their dependents have been required to pay for medical treatment and benefits, including prescription drugs. Defendant has also assured plaintiffs that they were being provided with competitive prices for prescription drugs which were prescribed by physicians employed by **ACIPCO** and filled by the ACIPCO Pharmacy, which plaintiffs have learned is not true.

Parties

2. Plaintiff John T. Burks is a citizen of the State of Alabama, residing at 5633 Amason Road, Mt. Olive, Alabama 35117. Mr. Burks retired in February 1974.

3. Plaintiff Claudia Cook is the widow C. J. Cook, a former employee of defendant, and a citizen of the State of

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1. The Employee Retirement Income Security Act of 1974 ("ERISA") (29 U.S.C. §1001, *et seq.*) was signed into law on Labor Day, September 2, 1974, by President Gerald R. Ford. Under no scenario or interpretation of ERISA would it apply to acts or matters occurring before September 2, 1974. 29 U.S.C. §1031.

Alabama, residing at Fairhaven Nursing Home in Birmingham, Alabama.

4. Plaintiff John Crumb is a citizen of the State of Alabama, residing at 3128 Norwood Boulevard, Birmingham, Alabama 35234. Mr. Crumb retired from ACIPCO in 1972.

5. Plaintiff Ed Dancy, Jr., is a citizen of the State of Alabama, residing at 840 Naussau Avenue, Southwest, Birmingham, Alabama 35211. Mr. Dancy retired from ACIPCO on April 1, 1973.

6. Plaintiff W. W. Harrell is a citizen of the State of Alabama, residing at 1619 Sunset Avenue, Gardendale, Alabama 35071. Mr. Harrell retired from ACIPCO on January 1, 1974.

7. Plaintiff Hattie B. Jackson is the widow of Calvin C. Jackson, a former employee of defendant, and a citizen of the State of Alabama, residing at 871 Seventh Street West, Birmingham, Alabama 35204. Mr. Jackson retired from ACIPCO in June 1974.

8. Plaintiff Calvin W. Johnson is a citizen of the State of Alabama, residing at 2259 Pike Street, Gardendale, Alabama 35071. Mr. Johnson retired from ACIPCO in February 1967.

9. Plaintiff Davis Jordan is a citizen of the State of Alabama, residing at 2212 Lee Avenue, S.W., Birmingham, Alabama 35211. Mr. Jordan retired from ACIPCO in 1973.

10. Plaintiff Myrtle Kilgore is the widow J. Hubert Kilgore, a former employee of defendant, and is a citizen of the State of Alabama, residing at 2105 Manassas Drive,

Birmingham, Alabama 35213. Mr. Kilgore retired from ACIPCO in 1972.

11. Plaintiff Hardy Douglas Marlin is a citizen of the State of Alabama, residing at 1649 Marlin Springs Road, Birmingham, Alabama 35215. Mr. Marlin retired from ACIPCO in February 1971.

12. Plaintiff Sadie L. McLoyd is the widow of Willie McLoyd, a former employee of defendant, and is a citizen of the State of Alabama, residing at 177 Redstone Way, Birmingham, Alabama 35215. Mr. McLoyd retired from ACIPCO in 1965.

13. Plaintiff Grace I. Mealer is the widow A. R. "Rush" Mealer, a former employee of defendant, and is a citizen of the State of Alabama, residing at 1432 Thompson Circle, Gardendale, Alabama 35071. Mr. Mealer retired from ACIPCO in April 1964.

14. Plaintiff William Pollard is a citizen of the State of Alabama, residing at 3146 Norwood Boulevard, Birmingham, Alabama 35234. Mr. Pollard retired from ACIPCO in 1970.

15. Plaintiff Isaac L. Ross is a citizen of the State of Alabama, residing at 616 77th Way South, Birmingham, Alabama 35206. Mr. Ross retired from ACIPCO in November 1971.

16. Defendant American Cast Iron Pipe Company (hereinafter, "**ACIPCO**") is, on information and belief, an Alabama corporation headquartered in Birmingham, Alabama, engaged in the business of manufacturing and producing ductile and cast iron pipe, and doing business in this state and judicial circuit.

17. The plaintiff class is comprised of former employees of **ACIPCO** or, if deceased, their surviving spouses, who retired prior to September 2, 1974, and who have been required, subsequent to that time, to pay for medical treatment and benefits, including prescription drugs, in violation of promises and representations made to them as terms and conditions of their employment.

Class Action Allegations

18. This action is being brought on behalf of all members of a plaintiff class pursuant to Ala. R. Civ. P. Rule 23. The class of persons represented by plaintiffs is comprised of all those persons who retired prior to September 2, 1974, or their surviving dependents, and who have been required subsequent to that time to pay for medical treatment and benefits, including prescription drugs.

19. On information and belief, such persons number in the hundreds or thousands and constitute a class so numerous that joinder of all class members is impracticable, particularly in light of the relatively small amount of each individual claim in relation to the costs and burdens of bringing suit.

20. Plaintiffs' claims are typical of this class. All class members were employed by defendant and retired prior to September 2, 1974, or are a surviving dependent of an employee of defendant who retired before September 2, 1974. They were all subjected to changes in the benefits provided to them in that at the time they retired, and for many years prior, they were assured that they would never have to pay for **any** medical treatment or benefits. Thereafter, the company required these retirees to pay for medical treatment and benefits, including prescription drugs.

21. Plaintiffs are adequate representatives of the class because their interests do not conflict with the interests of

the class and because they are represented by skilled and learned counsel who will fairly and adequately protect the interests of the class.

22. The questions of law and fact common to the plaintiff class are:

A. All members of the plaintiff class retired prior to September 2, 1974, or are dependents of employees who retired prior to September 2, 1974, and were promised free medical treatment and benefits, including prescription drugs.

B. All members of the plaintiff class were subsequently required to pay for part or all of their medical treatment and benefits, including prescription drugs.

C. All members of the plaintiff class have easily ascertainable damages.

23. These questions of law and fact are common to the plaintiff class and predominate over questions affecting only individual members. A class action is superior to other available methods for a fair and efficient adjudication of the controversy because such action is uniquely suited to determining the rights and damages to many similarly situated individuals while minimizing the amount of legal resources which must be utilized to resolve the controversy.

Factual Allegations

24. **ACIPCO** operates under the John J. Eagan Trust, which is named for its originator, John J. Eagan. When Mr. Eagan died in 1924, via a 1923 codicil to his will, he transferred all of his outstanding common stock of **ACIPCO**

to named trustees for the benefit of the company employees. The trustees include members of the Board of Operatives, which is comprised of twelve elected wage earners, and members of the Board of Management, which is comprised of five top executives. At least in theory, **ACIPCO** is owned by its employees and operated equally in the interest of the public and its employees. If Mr. Eagan knew how his beloved employees were being gouged on prescription drug prices, he would roll over in his grave.

25. **ACIPCO** employees and retirees, for decades, were consistently induced to accept employment with **ACIPCO** with the promise, *inter alia*, of free medical care, including prescription drugs. Numerous other **ACIPCO** employees were persuaded to stay with **ACIPCO** in a highly competitive local manufacturing economy due, in part, to representations of free medical care, to include prescription drugs. Such promises, representations and commitments found their way into print in myriad **ACIPCO** publications. Such promises were also regularly made or reiterated by senior **ACIPCO** executives. For example, Steve Moxley, **ACIPCO** President, told a meeting of **ACIPCO** employees in the mid-to-late fifties: "The reason we're not getting the same raises as U. S. Steel is getting is because we're putting it into medical so you'll get free drugs when you retire."

26. Summary descriptions of the health benefits available to **ACIPCO** retirees and dependents of deceased retirees are contained in numerous employee handbooks dated 1973, 1981, 1987, 1990, and 1995. Beginning with the 1981 booklet, the right to amend health benefits was arguably reserved to the Company. The reservation of rights in the 1981 booklet arguably is sufficient to allow the Company to amend the health plan for employees who retired after 1981. The 1973 summary description, however, contains no language reserving to the Company the right to amend

the benefits promised therein. The 1973 summary description also pre-dates the Employee Retirement Income Security Act of 1974 ("ERISA"). Plaintiffs or their deceased spouses all retired prior to September 2, 1974, ERISA's earliest effective date.

27. **ACIPCO** operates a Health Services Clinic that provides medical care and treatment, including prescription drugs, for **ACIPCO** employees, retirees, and their dependents. Until about June 1995, all drugs and medicines prescribed by an **ACIPCO** physician, **ACIPCO** dentist, or any referring physician or dentist to a retiree or a retiree's dependent, were covered 100% if dispensed by an **ACIPCO** pharmacist.

28. In or around June 1995, retirees and their dependents arbitrarily had a new co-pay imposed upon them which required them to pay 25% of the cost of all drugs and medicines dispensed by an **ACIPCO** pharmacist, including plaintiffs.

29. In late 1995 or early 1996, Jerry D. Sumerel, a retired employee of **ACIPCO**, was discussing his medications with a friend who was in the health insurance business. During his conversation with her, he told her he had just refilled his prescription for Feldene (generic name: Piroxicam) at the **ACIPCO** pharmacy. The total for the prescription filled by **ACIPCO** was $169.16 for 100 tablets, with Mr. Sumerel paying a 25% copay, or $42.29. Mr. Sumerel's friend told him that based upon her experience in the business that the amount he paid seemed excessive, and proceeded to call a local Wal-Mart pharmacy for a comparison. The Wal-Mart pharmacist told her that the entire cost for 100 tablets of the same medication at the Wal-Mart pharmacy would only be $18.98, or more than 200% less than what Mr. Sumerel had paid just for his 25% copay (and almost 900% less than the total cost of the same 100 tablets at ACIPCO). So much for competitively priced drugs. . . .

30. Mr. Sumerel and several other retirees complained to the president of **ACIPCO**, Mr. Van Richey, about the discrepancies in the price of his medication. As a result, Mr. Richey created a pharmacy committee, comprised of retired **ACIPCO** employees, to contact local pharmacies in order to obtain current pricing of selected drugs which were among the most prescribed and filled by the **ACIPCO** Pharmacy. Not one hourly employee was named to the committee. Sumerel protested this glaring omission, and, ultimately, was put on the committee himself. The committee found that numerous prescriptions filled by the **ACIPCO** pharmacy were overpriced, in some cases significantly so. Yet **ACIPCO** continued to represent to its employees and retirees that the **ACIPCO** pharmacy provided prescriptions at competitive prices.

31. A number of **ACIPCO** retirees remained dissatisfied with the Company's response to their allegations of price gouging for prescription drugs. They sought a meeting with President Van Richey. Among the seven retirees who met with Richey in April, 1997 were Sumerel; William R. ("Bill") Cale; Robert Haskill Johnson; and Lucian ("Bud") Troulias, Jr. Richey was most receptive. He listened patiently to the men. When the meeting was over, he looked them in the eye, flashed his youthful smile, and told them, "I want to meet with you again." The retirees quickly spread the word of Richey's interest, reassuring their fellow retirees that they had been heard, that the problem was being tended to. Now, almost two years later, the retirees are still waiting for Mr. Richey to get back with them. . . .

COUNT ONE
BREACH OF CONTRACT

32. Plaintiffs adopt and reallege each and every allegation contained in this Complaint as if set out herein, *in extenso*.

33. The aforementioned promises, statements, representations, and commitments to plaintiffs regarding their benefits, and specifically that they would be provided free medical treatment and benefits, including prescription drugs, after they retired, were material conditions of plaintiffs' employment, breach of which has caused plaintiffs to be damaged and injured.

WHEREFORE, PREMISES CONSIDERED, plaintiffs demand judgment against defendant in an amount that is just and appropriate as determined by a struck jury, plus interest and costs of this proceeding.

COUNT TWO
FRAUD

34. Plaintiffs adopt and reallege each and every allegation contained in this Complaint as if set out herein, *in extenso*.

35. At numerous times and on numerous occasions, plaintiffs were promised free medical care and treatment, including prescription drugs, and competitively priced prescription drugs, by defendant and its agents and officers. Defendant wanted and intended for plaintiffs to believe these statements, representations, promises, and commitments, and for plaintiffs to rely thereon.

36. Plaintiffs did believe said statements, representations, promises, and commitments, and in reliance thereon, plaintiffs did accept and/or continue their employment with defendant.

37. These statements, representations, promises, and commitments were false and defendant knew them to be false and were made with the intent, and effect, that they induced plaintiffs to undertake the aforesaid acts.

38. Defendant willfully, knowingly, intentionally, negligently, recklessly, mistakenly, or innocently made the aforesaid statements, representations, promises, and commitments which were false and which they knew at the time of their making were false, which were made with the intent of inducing certain conduct and behavior on the part of plaintiffs, on which promises, statements, representations, and commitments plaintiffs relied to their detriment. As a result of defendant's willful, knowing, intentional, negligent, reckless, mistaken, or innocent deception and fraudulent inducement, plaintiffs were proximately caused to be damaged and injured.

39. Or, in the alternative, at some time, at present unknown, defendant knew, was made aware of, realized, learned, decided, agreed, concluded, deduced, discovered, or conspired that it did not intend to provide free medical treatment and benefits to plaintiffs in a manner consistent with the aforesaid statements, representations, promises, and commitments, nor, consistent with the aforesaid statements, representations, promises, and commitments, did they intend to provide free medical treatment and benefits to plaintiffs as was represented to them. Defendant had a duty to disclose these facts to plaintiffs, but in breach of said duty, defendant willfully, knowingly, intentionally, negligently, recklessly, mistakenly, or innocently suppressed said facts from them, as a result of which plaintiffs were proximately caused to be damaged and injured as aforestated.

WHEREFORE, PREMISES CONSIDERED, plaintiffs demand judgment against defendant in an amount that it is just and appropriate as determined by a struck jury, plus interest and costs of this proceeding.

COUNT THREE
UNJUST ENRICHMENT

40. Plaintiffs adopt and reallege each and every allegation contained in this Complaint as if set out herein, *in extenso*.

41. As a result of the actions of defendant as described above, the defendant has been unjustly enriched and should return to plaintiffs and the class they represent the amount of money by which it has been unjustly enriched.

WHEREFORE, PREMISES CONSIDERED, plaintiffs demand judgment against defendant in an amount equal to every cent of co-payment every class member has paid defendant since imposition of the co-pay requirement, plus interest, costs of this proceeding, and a reasonable attorneys' fee.

COUNT FOUR
CONVERSION

42. Plaintiffs adopt and reallege each and every allegation contained in this Complaint as if set out herein, *in extenso*.

43. Defendant's wrongful withholding, keeping, and retaining of the payments made by plaintiffs for medical treatment and benefits, including prescription drugs, as outlined hereinabove, constitutes conversion, as a result of which plaintiffs were proximately caused to be and were injured and damaged as aforestated.

WHEREFORE, PREMISES CONSIDERED, plaintiffs demand judgment against defendant in an amount that is just and appropriate as determined by a struck jury, plus interest and costs of this proceeding.

REQUESTED RELIEF

WHEREFORE, the plaintiff class demands:

A. A refund to each plaintiff and to each class member of every cent of all moneys paid to **ACIPCO** for medical services and treatment received by each plaintiff or class member, including any and all co-payments for prescription drugs, plus interest.

B. Judgment against defendant in favor of plaintiffs and each member of the plaintiff class for damages in the amount determined to have been sustained by plaintiff and each member of the plaintiff class as a result of paying for medical treatment and benefits, including prescription drugs.

C. Punitive damages of not less than treble actual damages to deter defendant from continuing to require that retirees promised free medical treatment and benefits, including prescription drugs, pay for same.

D. Injunctive relief barring **ACIPCO** from continuing to require that plaintiffs pay for medical treatment and benefits, including a co-pay for prescription drugs.

E. Imposition of a plan or system, with proper monitoring and full accountability, to insure that prescription drug prices charged by the **ACIPCO** pharmacy are fully and completely competitive with prices charged in this area for prescription drugs.

F. Costs and attorneys' fees associated with bringing this action; and such other and further relief as this Court finds just or to which plaintiffs or class members are otherwise entitled.

Respectfully Submitted,

/s/ John D. Saxon
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OF COUNSEL

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PLAINTIFFS DEMAND TRIAL BY STRUCK JURY.

/s/ John D. Saxon
OF COUNSEL